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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 1245

JOHN C. TOOLE, JOSEPH R. APPLEGATE, RAYMOND DIX, ET AL.,

Appellants,

vs.

MICHIGAN STATE BOARD OF DENTISTRY, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MICHIGAN.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

HERBERT J. RUSHTON,
Attorney General of Michigan,
EDMUND E. SHEPHERD,
Solicitor General of Michigan,
Counsel for Michigan State Board of Dentistry;
WILBER M. BRUCKER,
ROBERT A. SULLIVAN,
Counsel for Michigan State Dental Society.

CLARK, KLEIN, BRUCKER & WAPLES,
Of Counsel.

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Plaintiffs & Appellants,

vs.

MICHIGAN STATE BOARD OF DENTISTRY, HARRY T. WOOD, CHARLES BARIBEAU, BOYD KELLEY, JAMES F. SPENCER, WILLIAM J. B. MASON AND G. G. JACOBS, AND MICHIGAN STATE DENTAL SOCIETY,

Defendants & Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MICHIGAN.

COUNTER-JURISDICTIONAL STATEMENT.

Appellants have filed an appeal from the decision of the Michigan Supreme Court in the case of *Toole et al.* v. *Michigan State Board of Dentistry et al.* (1942), 300 Mich. 180.

Jurisdiction for this Court is claimed under Section 237 of the Judicial Code as amended.

This appeal involves Act No. 122 of the Michigan Public Acts of 1939, being "An Act to regulate the practice of dentistry and dental surgery; to provide for the examination, licensing, registration and regulation of persons who may practice the same; to provide for the disposition of all moneys received under this act; to provide penalties for violations of this act; and to repeal certain acts and parts of acts."

Act No. 122 was passed by the Michigan legislature, signed by the Governor and was to have become effective on September 29, 1939. Before the effective date of the act appellants, representing a small minority of dentists (less than 1% of the dentists in the State of Michigan), were responsible for the filing of petitions requesting a referendum. The question of approval or rejection of the act was duly submitted to the voters at the general election held on November 5, 1940, and it was overwhelmingly approved by the people.[1]

After the referendum, appellants filed a Bill of Complaint in the Circuit Court for the County of Wayne, State of Michigan, setting forth in this bill that the act had not been validly submitted under Section 3 of Article 17 of the Michigan State Constitution; that certain sections of the act were contrary to specified provisions of the Michigan Constitution; that the act was outside the police power of the State; and that the act violated Section 1 of the 14th Amendment of the Constitution of the United States.

On July 30, 1941, the Circuit Court concluded that the act had been validly submitted to referendum and approved

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[1] The vote was 735,053 in favor of adoption and 516,597 against adoption of the act, or a majority of 218,456.

by a majority of the voters; that it was constitutional as being within the police power of the State to promote and protect the public health, safety and general welfare of the people of the State of Michigan; and that the act did not conflict with Section 1 of the 14th Amendment to the Constitution of the United States.

An appeal was taken by appellants to the Michigan Supreme Court, appellants questioning the act on substantially the same legal grounds as they had advanced in the Circuit Court. On January 5, 1942, the Michigan Supreme Court sustained the constitutionality of the act. In so far as the act was questioned on the ground that it violated due process of law under the United States Constitution, the court unanimously sustained the act and held:

> "The claim that the act violates the free speech section of the Constitution (1908), article 2, § 4, and the due process section, article 2, § 16, as well as the Fourteenth Amendment to the Constitution of the United States, is fully answered in Semler *v.* Oregon State Board of Dental Examiners, 294 U. S. 608 (55 Sup. Ct. 570, 79 L. Ed. 1086), and People *v.* Carroll, 274 Mich. 451."

A Petition for Re-hearing was filed by appellants. It was denied by the Michigan Supreme Court on February 17, 1942. A Motion for Reconsideration of the denial was likewise filed and denied.

During the period in which these proceedings were pending, as well as presently pending a disposition of this appeal, appellants have had a restraining order precluding the enforcement of the act. Accordingly, appellants have been able to continue to violate the law with immunity for a period in excess of two and one-half years. It would indeed be unfortunate to allow the proceedings in this Court to unnecessarily further delay the enforcement of this public act, particularly when the "alleged" Federal ques-

tion raised by appellants is clearly not debatable and entirely lacking in merit.

A consideration of the Jurisdictional Statement and Assignment of Errors reveals that appellants have misconceived the purpose of an appeal to this Court. Primarily, the appeal is sought for the purpose of obtaining a reconsideration of purely local questions. Appellants assert in the appeal, as they did in the State Courts, that Act No. 122 of the Michigan Public Acts of 1939 was not validly submitted under Section 3 of Article 17 of the Michigan Constitution, and that the portion of Section 1 pertaining to the appointment of members of the Michigan State Board of Dentistry violates the Michigan Constitution. Obviously, these matters do not confer jurisdiction upon this Court. It has been recognized by this Court that it will follow the decision of the State Supreme Court in matters involving the construction and application of a statute under the State Constitution.

Douglas v. *Noble* (1922), 261 U. S. 165;

Senn v. *Tile Layers Protective Union* (1936), 301 U. S. 468;

Wilson v. *State of North Carolina ex rel. Caldwell* (1897), 169 U. S. 586;

Palmer et al. v. *State of Ohio* (1918), 248 U. S. 32;

Memphis Street Railway Co. v. *Moore* (1916), 243 U. S. 299.

The only reference to any Federal question in the Jurisdictional Statement and Assignment of Errors which might possibly confer jurisdiction is appellants' assertion that Act No. 122 of the Michigan Public Acts of 1939, being an act to regulate the practice of dentistry, is outside the police power of the State and hence is in contravention of Section 1 of the 14th Amendment of the Constitution of the United

States. It is most significant that appellants have not in this proceeding or any of the proceedings presented a single case which supports this bare assertion.

A bare assertion that a Federal question is involved is not sufficient to confer jurisdiction upon this Court; the Federal question must be real and substantial and not frivolous or fictitious; and if questions upon which the jurisdiction depends are well settled by prior decisions, the appeal must be dismissed for want of jurisdiction.

Hamblin v. *Western Land Company* (1893), 147 U. S. 531;

New Orleans Waterworks Co. v. *Louisiana* (1902), 185 U. S. 336;

Patterson v. Standolind Oil & Gas Co. (1938), 305 U. S. 376;

Seaboard Air Line Railroad Co. v. *Watson* (1932), 287 U. S. 86;

Deming v. *Carlisle Packing Co.* (1912), 226 U. S. 102.

Appellants have failed to raise a substantial Federal question and the appeal should be dismissed.

This Court without exception has sustained the power of the State legislature to regulate dentistry under the police power notwithstanding the objection made that the regulations are contrary to the requirements of due process of law.

Semler v. *Oregon State Board of Dental Examiners* (1933), 294 U. S. 608;

Douglas v. *Noble* (1922), 261 U. S. 165;

Graves v. *Minnesota* (1926), 272 U. S. 425;

Dent v. *West Virginia* (1888), 129 U. S. 114.

This Court has also sustained the right of the state under the police power to regulate the practice of dentistry for

the purpose of insuring the personal relation between the dentist and his patient.

Miller v. *State Board of Dental Examiners of Colorado et al.* (1932), 287 U. S. 563;

Approving—*State Dental Examiners* v. *Miller,* 290 Colo. 193, 8 Pac. (2d) 699.

In view of the fact that a State statute is to be considered in the light of the principle that a State legislature is the primary judge of the regulations enacted in the interest of the welfare and safety of the people and police statutes can be held unconstitutional only where they are arbitrary or unreasonable attempts to exercise this power, it is apparent that Act 122 of the Michigan Public Acts of 1939 does not involve any Federal questions which have not already been passed upon by this Court. As a matter of fact, appeals involving substantially the same questions have been recently dismissed by this Court on the ground that no substantial Federal question was involved.

Brown v. *Commonwealth of Massachusetts* (1939), 308 U. S. 504;

Approving—*Brown* v. *Commonwealth of Massachusetts,* 20 N. E. (2d) 478;

Orwitz v. *Board of Dental Examiners of California* (1940), 313 U. S. 546; approving 41 Cal. App. (2d) 653, 107 Pac. (2d) 407.

In conclusion, inasmuch as the Jurisdictional Statement and Assignment of Errors of appellants primarily involve the construction of a State statute under a State Constitution and present no substantial Federal question, it is re-

spectfully submitted that this Court does not have jurisdiction to entertain the appeal.

Respectfully submitted,

HERBERT J. RUSHTON,
Attorney-General for the State of Michigan,
By EDMUND E. SHEPHERD,
Solicitor-General for the State of Michigan,
Attorneys for Michigan State Board of Dentistry;
CLARK, KLEIN, BRUCKER & WAPLES,
WILBER M. BRUCKER,
ROBERT A. SULLIVAN,
Attorneys for Michigan State Dental Society.

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MICHIGAN STATE BOARD OF DENTISTRY, HARRY T. WOOD, CHARLES BARIBEAU, BOYD KELLEY, JAMES F. SPENCER, WILLIAM J. B. MASON AND G. G. JACOBS, AND MICHIGAN STATE DENTAL SOCIETY,

Defendants & Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MICHIGAN.

MOTION FOR DISMISSAL OF APPEAL OR, IN THE ALTERNATIVE, AFFIRMATION OF THE DECISION OF THE MICHIGAN SUPREME COURT.

To the Supreme Court of the United States:

Now comes the Michigan State Board of Dentistry and its members, appellees, by the Attorney-General for the

State of Michigan, and Michigan State Dental Society, intervening appellees, by Clark, Klein, Brucker & Waples, and respectfully represent as follows:

1. That under date of March 28, 1942, the court entered an order allowing an appeal from the decree of the Supreme Court of the State of Michigan in the case of *Toole, et al.* v. *Michigan State Board of Dentistry* (1942), 300 Mich. 180, in which case the Michigan Supreme Court sustained the constitutionality of Act 122 of the Michigan Public Acts regulating the practice of dentistry in the State of Michigan.

2. That the Assignments of Errors and Jurisdictional Statement show that the appeal is based primarily upon the construction of said Act 122 under the Michigan Constitution, which matters are outside the jurisdiction of this Court.

3. That none of the Federal questions raised in said Assignment of Errors and Jurisdictional Statement are of substantial nature, sufficient to confer jurisdiction upon this Court.

4. That if the appeal involves any substantial Federal questions, these were properly decided by the Supreme Court for the State of Michigan and its decision should be affirmed.

5. That the appeal involves a Public Act containing criminal penalties and was filed primarily for delay.

WHEREFORE, it is respectfully requested that the appeal be dismissed or, in the alternative, the decision of the Supreme Court of Michigan be affirmed.

Respectfully submitted,

HERBERT J. RUSHTON,
Attorney-General for the State of Michigan,
By EDMUND E. SHEPHERD,
Solicitor-General for the State of Michigan,
Attorneys for Michigan State Board of Dentistry;
CLARK, KLEIN, BRUCKER & WAPLES,
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